IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD SILVAS, an Infant by RAMON SILVAS, his Guardian ad litem,

Plaintiff in Error.

vs.

THE ARIZONA COPPER COMPANY, LIMITED,

Defendant in Error.

2465

BRIEF OF DEFENDANT IN ERROR

W. C. McFARLAND,
Attorney for Defendant in Error,
Clifton, Arizona.

Filed this ..... day of 1914

Filed

..... Clerk.

By SEP 29 1914 ..... Deputy Clerk.

F. D. Monckton,

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RICHARD SILVAS, an Infant by RAMON SILVAS, his Guardian ad litem,

Plaintiff in Error.

vs.

THE ARIZONA COPPER COMPANY, LIMITED,

Defendant in Error.

BRIEF OF DEFENDANT IN ERROR

The record in this case discloses that the attorneys of Plaintiff in Error are prosecuting this action under a written contract by the terms of which they are to receive Fifty Per Centum of the amount recovered by suit or compromise in full compensation for their services, in fact, it was admitted by Plaintiff in Error and his counsel in the court below that such a contract existed and the fee for their services in this case was contingent on the amount recovered by suit or compromise.

The contention of Plaintiff in Error is that neither the infant plaintiff nor his guardian ad litem should be required to give security for costs for the reason that under the Revised Statutes of Arizona, 1913, neither guardians nor guardians ad litem are liable for costs nor shall in any case be required to give security for costs. The several provisions of the Revised Statutes of Arizona on this subject will be found in the following paragraphs:

Par. 414: "No person shall be appointed as guardian ad litem except upon his written consent, and he shall not be liable for costs, unless by special order of the court for some misconduct therein."

Par. 646: "Neither the state nor any county thereof nor any state board or commission or state officer in his official capacity nor any executor, administrator or guardian, appointed under the laws of this state nor any trustee in bankruptcy shall be required in any case to give security for costs."

This contention of Plaintiff in Error is based on Sec. 914 of the Revised Statutes of the United States, being Section 5 of the act of June 1, 1872, Chap. 255, 17 Sta. at Large 197 (U. S. Comp. Stat. 1901, page 684 Rev. Stat. Anno. Vol. 2, p. 1432) commonly called the "Conformity Statute" which provides:

"The practice, pleadings, and forms and modes of procedure in civil cases, other than in equity and admiralty cases, of the circuit and district courts, shall conform as near as may be

to the practice, pleadings and forms and modes of procedure existing at the time in like cases in the courts of record of the State in which such circuit or district courts are held. Any rule of court to the contrary notwithstanding."

Defendant in Error contends that Congress by act of July 20, 1892 has covered the entire field of costs and the mode and manner of securing the same. Hence, the sole question presented for decision is whether the several provisions of the Arizona statute in respect to costs and security therefor are controlling in cases pending in the Federal Courts in the states where such courts are held or whether the act of Congress of July 20, 1892 which specially provides for costs and security therefor furnishes the guide for Federal Courts on this subject. Defendant in Error contends that the Act of July 20, 1892 covers the entire field of costs and the mode and manner of securing the same; that this act is made specially applicable to Federal Courts sitting in the particular state. The uniform current of decisions of the Federal Court is that in such a situation the act of Congress is the sole guide and the provisions of the state law are inapplicable. The universal rule being that when Congress has legislated upon the same subject covered by State Statutes that such Federal legislation is exclusive and the sole guide for Federal courts sitting in a particular state. As said by Mr. Justice Gray in the case of Southern Pacific Ry. Co. vs. Denton, 146 U. S. 202 (56 L. Ed. 942) speaking for the Court on page 209:

"And whenever Congress has legislated upon any matter of practice and prescribed a definite rule for the government of its own courts, it is

to that extent exclusive of the legislation of the State upon the same matter."

In the case of Luxton vs. North River Bridge Company, 147 U. S. 337 (37 L. Ed. 194) the court on page 338 very clearly states the rule in the following language:

"This direction that the proceedings in the Circuit Courts of the United States shall 'conform as nearly as may be to the practice in the courts' of the state must of course like the corresponding direction as to practice, pleading and procedure in Sec. 914 of the Revised Statutes of the United States, give way when to adopt the State practice would be inconsistent with the terms, defeat the purpose or impair the effect of any legislation of Congress."

To the same effect are the following cases:

I. & St. L. Ry. Co. vs. Horst, 93 U. S. 291-300 (28 L. Ed. 898.)

Whitford vs. Clark Co., 119 U. S. 522-525 (30 L. Ed. 500).

In re Fisk 113 U. S. 713-720 (28 L. Ed. 1117).

Chateaugay Co. Petitioner, 128 U. S. 544-554 (32 L. Ed. 508).

Mex. Cent. Ry. Co. vs. Pinkney, 149 U. S. 194-206 (37 L. Ed. 699).

Shepard vs. Adams, 168 U. S. 618-626 (42 L. Ed. 602).

Hefley vs. Ry. Co., 158 U. S. 98-105 (39 L. Ed. 910).

Chappell vs. U. S. 160 U. S. 499-514 (40 L. Ed. 510).

St. Clair vs. U. S., 152 U. S. 134-154 (38 L. Ed. 936).

Western L. & S. Co. vs. Butte C. M. Co., 210 U. S. 368-369 (52 L. Ed. 1101).

Kelsey vs. Forysth, 21 Howard 85 (16 L. Ed. 32).

Galloway vs. Ft. Worth Bank, 186 U. S. 177-178 (46 L. Ed. 1111).

Phelps vs. Oaks, 117 U. S. 236-239 (29 L. Ed. 888).

Lincoln vs. Powers, 151 U. S. 436-443 (38 L. Ed. 224).

Potter vs. Bank, 102 U. S. 163-165 (26 L. Ed. 111).

Interstate Com. Co. vs. Ry. Co., 167 U. S. 633-642 (42 L. Ed. 306).

Hills Co. vs. Hoover, 220 U. S. 329 (55 L. Ed 485).

In the Hoover case above cited is the last expression so far as we are advised of the Supreme Court of the United States on this subject. Mr. Justice Day delivering the opinion on page 336 says:

> "This section (914) is intended to secure on the law side of the Federal Courts, practice which prevails in like causes in courts of the States. It's requirement is that such proceedings shall conform 'as near as may be' to that prevailing in the state courts 'in like cases.' This section was not intended to require the adoption of state practice where it would be inconsistent with the terms or defeat the purposes of the legislation of Congress."

That the U. S. Circuit Courts of Appeal and Federal, Circuit and District Courts by uniform current of decisions are in accord with the Supreme Court of the United States in its construction and interpretation of the "Conformity Statute" is shown by the following cases:

Lange vs. U. P. Ry. Co., 126 Fed. 338-340.
Webb vs. Goldsmith, 127 Fed. 572.
Swift vs. Jones, 145 Fed. 489-491.
Booth vs. Denike, 65 Fed. 43-46.
U. S. vs. Nat'l. Lead Co., 75 Fed. 94-95.
U. S. vs. Eisenbeis, 112 Fed. 190-196.
Weller vs. Penn. Ry. Co., 113 Fed. 502-506.
Millers Admr. vs. Norfolk & W. Ry. Co., 47 Fed. 264-265.
Van Doren vs. Penn Ry. Co., 93 Fed. 260-268 to 271.
O'Connell vs. Reed, 56 Fed. 531-534 to 539.
Tyron vs. Penn. Ry. Co., 213 Fed. 49.
U. S. Ex rel Coquard vs. Indian G. D. Dist., 85 Fed. 928-930.
Seeley vs. K. C. Star Co., 71 Fed. 554.
U. S. Ex rel vs. Arnold, 69 Fed. 987-992.
Martindale vs. Waas, 11 Fed. 551.
Chic. N. W. Ry. Co. vs. Kendall Co., 167 Fed. 62-64 et seq.
Hughey vs. Sullivan, 80 Fed. 72-74.
City of Manning vs. German Ins. Co., 107 Fed. 52-57.
Collin Co. National Bank vs. Hughes, 155 Fed. 389-394.
Williamson vs. L. L. & Globe Ins. Co., 141 Fed. 54-58.
Erstein vs. Rothchild, 22 Fed. 61-64.
Wall vs. Chesapeake & O. Ry. Co., 95 Fed. 398-401.

Consumers Cotton Oil Co. vs. Vashburn, 81 Fed. 331-333.

Walker vs. Collins, 50 Fed. 737-739.

O'Neil vs. K. C. S. & M. Ry. Co., 31 Fed. 663.

Menge vs. Warriner, 120 Fed. 816.

City of St. Charles vs. Stookey, 154 Fed. 772-778.

Allnut vs. Lancaster, 76 Fed. 131-134.

In Truckee River Gen. Elec. Co. vs. Benner, 211 Fed. 79 on page 81, Mr. Circuit Judge Gilbert speaking for the Court states the rule as follows:

> "Although Sec. 914 of the Revised Statutes (U. S. Comp. Stat. 1901, page 684) requires the District Courts of the United States in matters of practice, pleadings and forms, in actions at law to conform as nearly as may be to the State practice, Sec. 954 of the R. S. (U. S. Comp. Stat. 1901, page 961) contains the legislation of Congress on the subject of amendments to pleadings in Federal Courts and is paramount to the local State statute."

The legal and logical conclusion from the cases cited being that when Congress has legislated upon any particular matter of practice and prescribed a definite rule for the government of its courts, it is to that extent exclusive of the State legislation upon the same matter. It becomes material to consider what is required by the congressional legislation in respect to affidavits of parties who seek to relieve themselves from paying costs or giving security therefor. Under Sec. 1 of the Act of Con-

gress, July 20, 1892 (27 Stat. at Large 252) the requisites of the written statement required by Section 1 of this act have frequently been before the Federal Courts for construction and interpretation. The uniform ruling of these courts in respect to the requirements of the written statement is, that when it appears that the action is being prosecuted by attorneys for a contingent fee the affidavit of the party that he is unable to pay or give security for costs is insufficient, unless it contains the further statement that there is no other person interested by contract or otherwise in the cause of action or entitled to share in the recovery, who is able to pay or secure the costs.

In Boyle vs. Great Northern Ry. Co., 63 Federal 539, the court says:

"There is no question but what a poor person can prosecute his cause and obtain a full hearing, but at the same time litigation is not to be fostered and encouraged by allowing the plaintiff to evade any expense which he makes. That is a duty of any party having sufficient means, and is not to be evaded. If he is not able to pay costs or give security for them, he can have justice without it. But a person who acquires by contract an interest in any litigation, and a right to share in the fruits of a recovery, and who is not entitled to sue in forma pauperis, cannot be permitted, under cover of the name of a party who is a poor person, to use judicial process and litigate at the expense of other people. I think it does make a difference whether the plaintiff has made a contract with his counsel for their compensation. It makes this difference: That, after a contract has been

made with counsel for a pecuniary interest in a lawsuit, the case is carried on partially for their benefit; and, if they are able to pay the expenses of the litigation, it is unjust for the court to allow the litigation to go on for their benefit, without expense, on the pretense that the plaintiff is unable to pay, and that there is no other person interested, by contract or otherwise, in the cause of action, or entitled to share in the recovery, who is able to pay or secure the costs. I think that such a rule is in keeping with the meaning and spirit of this law, and it is founded in reason."

In Feil vs. Wabash R. Co. 119 Fed. 490, it was disclosed that the case was being prosecuted by the plaintiff's attorney on contingent fees. Speaking of the effect of such contract or contingent fees on the right of the plaintiff to be relieved of costs under the act of July 20, 1892, the court held that in such cases the plaintiff represents, not only her own interest, but also that of the attorneys in the case, and she sues for herself and as trustee for others, and standing in this position, she could not be held to be poor within the meaning of the law, unless the beneficiaries are poor also. The court concludes:

"No petition to sue as a poor person can avail, unless it discloses that all the beneficiaries, as well as the nominal plaintiff, come within the purview of the act."

In the case of Phillips vs. Louisville & N .R. Co. (C. C.) 153 Fed. 795, is a full and able discussion of the objects to be of interest as a clear statement of the law:

"This statute is of a charitable and beneficent nature. Its sole purpose is to enable persons, who in good faith are unable, on account of poverty, to prosecute any suit or action in the courts of the United States, to obtain a fair chance to have the rights adjudicated. It is not intended that the statute should be used directly or indirectly to benefit those who are able to prosecute their suits. The citizen seeking the benefit of the statute, and making the affidavit of poverty required thereby, must of necessity be the only person benefited by his cause of action. It surely was never intended by the statute that two or more persons should be interested financially in the result of a suit or action brought, and that, if one of them happens to be without means, this one can be permitted to make an affidavit of poverty and secure the benefits of the statute for the other parties to the suit, who are able to prosecute same, even though they may not appear by name as parties

The admission by the attorneys for the plaintiff that they were interested to the extent of one-third of any amount that might be recovered made them financially interested in the result of the lawsuit, and, unless they, too, could make and file an affidavit as to their poverty, the plaintiff in this cause could not obtain the benefit of the statute."

On the subject of parties suing in a representative capacity, the Circuit Court of Appeals for the Sixth Circuit speaking through Mr. Circuit Judge Lurton (the late Mr. Justice Lurton of the Supreme Court of the United States) in the 111 Fed.

716 uses this language as to what an affidavit under this law must disclose:

> "The affidavit in this case is defective in this: The suit is that of the widow and administratrix of Frank Reed who sues for damages consequent upon the tortious killing of her intestate and husband. Under the Ohio statute authorizing such an action, the damages recoverable are for the benefit of the widow and children of the deceased, and they are the real parties in interest.

Bates' Ann. St. Ohio, Par. 6135. The beneficiaries and real parties in interest are therefore the widow and the children of the deceased. The The affidavit shows sufficiently the poverty of the wdiow, but is defective in not making a like showing in behalf of the children of the deceased. It may be that the estate of the deceased is able to prepay the costs of the writ of error, or secure the same. If so, the act would have no application. The affidavit makes no showing as to the value of the estate of which the plaintiff is administratrix. The application is for these reasons denied but without prejudice to its renewal upon an affidavit showing that the estate of the deceased, as well as the beneficiaries, is unable to pay the costs or give security."

In the case of Volk vs. B. F. Sturtevant Co., 99 Fed. 532, which was also a case prosecuted by an Administrator, the Court of Appelas, First Circuit holds under the act of July 20, 1892 (27 Stat. at Large 252):

> "To authorize the granting of leave to pro-

ceed in forma pauperis under such statute it must be shown that the petitioner is a citizen of the United States and where he sues as a representative of the decendent the financial condition of the estate as well as his own must appear; and in as much as the statute is expressly limited to those who are unable to pay the fees and costs of the suit or give security for the same, a showing of inability and not merely inconvenience or hardship is essential."

In Clay vs. Southern Ry. Co., 90 Fed. 472, a case prosecuted by an administrator, the Circuit Court of Appeals for the Sixth Circuit in respect to security for costs under the act holds as follows:

"PER CURIAM: This petition must be denied because it does not appear therefrom that the persons who claim to be the beneficiaries and the real parties in interest in the cause of action are paupers and unable to pay the ordinary costs of the proceedings in error. It is not sufficient in a suit brought by one in a representative capacity as in the case with such suits under the Tennessee statutes, to make it appear that in his representative capacity he has not funds with which to prosecute the suit. It must also appear that those persons who will enjoy the fruit of the litigation, and who are the real parties in interest, are also in such condition of poverty that they cannot pay the costs of that which is done for their benefit. The application is therefore denied, without prejudice to its renewal, upon an affidavit which shall remedy the defect herein pointed out, within thirty days."

In the case of Esquibel vs. A. T. & S. F. Ry. Co., 206 Fed. 863 which was a case prosecuted in a representative capacity, District Judge Pope for the District of New Mexico in passing upon the motion for security for costs under the act of July 20, 1892 in respect to the right to sue without security for costs, where the attorneys are prosecuting the case upon a contingent fee states the rule as follows:

> "The question raised is whether under such circumstances the showing for leave to sue in forma pauperis must include a showing that the attorney has an interest in the result of the case as well as the plaintiff and other beneficiaries (she suing as administratrix) is unable to give security for costs. The Federal authorities which have construed the law on the subject above cited are unanimous in the holding that the showing to be complete must be to the effect, not only that plaintiff herself is unable to furnish security, but that all persons interested in the result of the suit must likewise be shown to be thus unable to furnish security."

It would seem the above cases interpreting and construing the act of Congress of July 20, 1892 would be conclusive on this subject under the well established rule of statutory construction that "all laws must be held to convey that meaning which is given them by the construction of the courts."
Holt vs Bergevin, 60 Fed. 1-3.

There may be cases seemingly holding a contrary view to the cases cited in the Federal Courts but it will be found that such decisions were rendered either prior to the Act of 1892 or that

the State statute on the subject of procedure has been adopted by some rule of court.

U. S. vs. Breitling, 20 How. 252 (15 L. Ed. 900).

Federal Courts in some districts, and particularly New York have by rule adopted the practice act of the state of New York and in that jurisdiction it has been held that the New York court of procedure adopted by the court is the rule in respect to requiring security for costs.

Hugunin vs. Thatcher, 18 Fed. 105.

Windkley Co. vs. Bowen Mfg. Co., 180 Fed. 624.

Or where a state rule of property is involved.

Bacon vs. The W. W. M. Life Ins. Co., 131 U. S. 258 (33 L. Ed. 128).

There is no pretense however that the Federal Court for the district of Arizona has by any rule adopted the procedure or practice of the state of Arizona in respect to security for costs.

In the case of Roy vs. Louisville N. O. & T. Ry. Co., 34 Fed. 276, Judge Hammond of the District Court for the Western District of Tennessee quoting the syllabus states the law on this subject in the following language:

> "INFANTS—The right to sue in forma pauperis. Neither the paupers oath of an infant plaintiff nor that of the next friend can entitle them to sue without security for costs."

The Court also holds in this case that the Tennessee Statute on the subject of costs and security

therefore is not binding on the Federal Court. This case is cited with approval on page 192 in case of in re Collier, 93 Fed. 191 and in the case of Brinkley vs. L. & N. Ry. Co., 95 Fed. 345 on page 353.

For a very clear and exhaustive statement of the law on this subject we respectfully call the attention of the Court to the written opinion of the learned Judge in the court below, which will be found in 213 Fed. 504. On the grounds stated and supported by the uniform current of decisions in the Federal Courts, we respectfully and earnestly urge that the order and judgment of the Court below requiring plaintiff to enter into a bond securing costs in this case and the order of the Court dismissing this cause for failure of plaintiff to comply with same should be affirmed.

Respectfully submitted,

W. C. McFARLAND,

Attorney for Defendant in Error,

Clifton, Arizona.